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In The
Supreme Court of the United States

DORA B. SCHRIRO, DIRECTOR, ARIZONA DEPARTMENT OF CORRECTIONS,

Petitioner,

v.

WARREN WESLEY SUMMERLIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER ON THE MERITS

TERRY GODDARD
Attorney General

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

JOHN PRESSLEY TODD*
ROBERT L. ELLMAN
Assistant Attorneys General

1275 West Washington
Phoenix, Arizona 85007-2997
Telephone: (602) 542-4686

*Counsel of Record

Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

CAPITAL CASE
QUESTIONS PRESENTED FOR REVIEW

In *Ring v. Arizona*, 536 U.S. 584, 589 (2002), this Court held that the Sixth Amendment's jury-trial guarantee extends to the determination of any fact, other than a prior conviction, that increases the maximum punishment for first-degree murder from life imprisonment to death. In this case, the United States Court of Appeals for the Ninth Circuit held that the rule announced in *Ring* applies retroactively to cases on collateral review.

1. Did the Ninth Circuit err by holding that the new rule announced in *Ring* is substantive, rather than procedural, and therefore exempt from the retroactivity analysis of *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion)?

2. Did the Ninth Circuit err by alternatively holding that the new rule announced in *Ring* applies retroactively to cases on collateral review under *Teague*'s exception for watershed rules of criminal procedure that alter bedrock procedural principles and seriously enhance the accuracy of the proceedings?

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OPINION BELOW

The United States Court of Appeals for the Ninth Circuit reversed the district court's judgment denying federal habeas relief on Summerlin's state death sentence. The unpublished district court order is reprinted at Appendix C of the Petition for Writ of Certiorari. The Ninth Circuit's opinion is published at *Summerlin v. Stewart*, 341 F.3d 1082 (9th Cir. 2003), and reprinted at Appendix A of the Petition for Certiorari.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its decision on September 2, 2003. Petitioner timely filed a Petition for Writ of Certiorari that this Court granted on December 1, 2003. This Court has jurisdiction pursuant to United States Constitution Article III, Section 2; 28 U.S.C. § 1254(1); and Supreme Court Rule 10.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process

for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Nearly a quarter of a century ago, Respondent Warren Summerlin raped and murdered Brenna Jean Bailey. Ms. Bailey had gone to Summerlin's residence on behalf of her employer to discuss a delinquent debt. Summerlin bashed in Ms. Bailey's skull, wrapped her in a bedspread, and discarded her partially nude body in the trunk of her car. (Tr. 6/2/82, at 166-67, 176; Tr. 6/7/82, at 133, 156-57.) Following an investigation that inculpated Summerlin in the murder, the State charged him with sexual assault and first-degree murder. (Cert. Pet. App. A-3 to -4; App. 51.)

In June 1982, a jury convicted Summerlin of both charges. Following an aggravation/mitigation hearing, the trial court sentenced Summerlin to twenty-eight years' imprisonment for the sexual assault conviction and imposed the death penalty for the first-degree murder conviction. The trial court found two aggravating circumstances that rendered Summerlin eligible for a death sentence under Arizona's capital sentencing statute: (1) he had a prior felony conviction involving the use or threat of violence against another person; and (2) he had committed the murder in an especially cruel, heinous, or depraved

manner. (App. 45.) The court found no mitigating circumstances sufficient to call for leniency. (*Id.* at 46-47.)

On direct appeal, the Arizona Supreme Court affirmed Summerlin's convictions and sentences. (App. 71.) In its independent review of the trial court's imposition of the death penalty, the court confirmed the trial court's finding of two aggravating circumstances and no mitigating circumstances sufficient to call for leniency. (*Id.* at 69-70.)

Summerlin's direct appeal included an argument that Arizona's death penalty statute violated the Sixth Amendment's jury-trial guarantee because it left "all of the decisions upon which the penalty is predicated in the hands of the judge alone." (App. 49.) He further argued that the second aggravating circumstance involved "a factual determination about the nature of the crime rather than a determination about the nature of the defendant and his background." (*Id.* at 50.) In *Proffitt v. Florida*, 428 U.S. 242 (1976), this Court had upheld the constitutionality of Florida's death-penalty sentencing statute in which the judge, rather than the jury, made the final sentencing determination. Relying on *Proffitt*, the Arizona Supreme Court rejected Summerlin's argument. (App. 67-68.) Summerlin's direct appeal became final on April 17, 1984, when time elapsed for seeking certiorari review by this Court.

After unsuccessfully pursuing state post-conviction relief, Summerlin initiated federal habeas corpus proceedings in April 1986. The claims he raised in his habeas petition included an argument that having a court determine the aggravating circumstances underlying his death sentence violated the Sixth, Eighth, and Fourteenth Amendments. While the habeas proceeding was pending,

this Court decided *Walton v. Arizona*, 497 U.S. 639 (1990), expressly rejecting a Sixth Amendment challenge to Arizona's death-penalty sentencing scheme under which judges determined whether the state had established aggravating circumstances that exposed a defendant to the death penalty. Relying on *Walton*, the district court rejected this claim and denied relief on the habeas petition. (Cert. Pet. App. C-2, -23 to -24.)

In March 1998, Summerlin appealed the district court's judgment to the United States Court of Appeals for the Ninth Circuit, asserting this same Sixth Amendment claim, among others. Relying on *Walton*, a Ninth Circuit panel rejected the claim, but remanded the case for an evidentiary hearing based on a different claim. *Summerlin v. Stewart*, 267 F.3d 926, 956-57 (9th Cir. 2001), *op. withdrawn by* 281 F.3d 836 (9th Cir. 2002).

While this case was pending en banc review by the Ninth Circuit, this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002), reversing *Walton* and holding that the Sixth Amendment's jury-trial guarantee extends to the determination of facts, other than prior convictions, that make a defendant in a first-degree murder case eligible for the death penalty. *Ring* extended to the capital sentencing context this Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), that any alleged fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. 536 U.S. at 609.

An en banc panel of the Ninth Circuit affirmed the district court's judgment concerning Summerlin's convictions, but vacated his death sentence, holding that the new rule announced in *Ring* applied retroactively to Summerlin's case. The Ninth Circuit majority offered two

alternative theories to justify this conclusion. First, the court found that *Ring* altered Arizona's substantive statutory law by creating a new crime of "capital murder." (Cert. Pet. App. A-28 to -41.) Second, the court held that even if *Ring* did not alter Arizona's substantive criminal law, it announced a new procedural rule that applied retroactively under an exception to the general principle that new procedural rules do not apply to cases on collateral review. In particular, the court found that *Ring* fell within an exception set forth in *Teague v. Lane*, 489 U.S. 288 (1989), for watershed rules that seriously enhance the accuracy of the proceeding and alter our understanding of bedrock procedural elements. (*Id.* at A-44 to -63.)

Three judges dissented from both holdings. (*Id.* at A-69 to -83.) In concluding that *Ring* announced a procedural rule, rather than a substantive one, the dissenters noted that the *Ring* rule is an application of the rule announced in *Apprendi*, which this Court has characterized as procedural: "In short, *Ring* changed the '*who*' of the capital sentencing determination, not the '*what*.'" (*Id.* at A-75; emphasis added.) The dissenting judges further opined that the majority's conclusion that *Ring* changed Arizona's substantive criminal law directly conflicted with the Arizona Supreme Court's authoritative construction of Arizona law. The state court had held that *Ring* did not change Arizona's substantive criminal law because it affected neither the facts necessary to establish aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt.

The dissenting judges also disagreed with the majority's alternative holding that if *Ring* announced a procedural rule, it nonetheless applied retroactively under the "watershed" exception. The dissenters noted that there

was no compelling evidence to support "the majority's facile conclusion that transfer of capital sentencing responsibility to a jury will enhance the accuracy of the process." (*Id.* at A-80.) The dissenters further found that *Ring* did not alter our understanding of bedrock procedural principles, noting that the majority based its conclusion to the contrary on its erroneous belief that *Ring* error was not subject to a harmless-error analysis. (*Id.* at A-82 to -83.)

On December 1, 2003, this Court accepted certiorari review of the Ninth Circuit's ruling to address two issues: (1) whether the rule announced in *Ring* is substantive, rather than procedural, and therefore exempt from *Teague*'s retroactivity analysis, and (2) if the rule is procedural, whether it fits within the "watershed" exception to the general rule of nonretroactivity.

SUMMARY OF ARGUMENTS

When this Court announces a new substantive interpretation, it applies retroactively to all criminal cases regardless where they are in the process. *See Bousley v. United States*, 523 U.S. 614, 620-21 (1998). In contrast, new procedural rules do not apply retroactively to cases that are final on direct appeal at the time the rule is announced unless the rule corrects an error that seriously diminishes the fundamental fairness and accuracy of the proceedings. *Teague*, 489 U.S. at 311, 313 (plurality opinion). The new rule announced in *Ring* does not apply retroactively because it is procedural, rather than substantive, and does not call into question the fairness and accuracy of the trial or sentencing proceedings.

The Ninth Circuit's ruling that *Ring* made a substantive change in Arizona law does not withstand scrutiny. *Ring* did not change *what* is found, but only *who* finds it. *Ring* did not hold that first-degree murder was no longer a crime or that there was anything unclear or equivocal about any term defined in Arizona's first-degree murder statute. It did not substantively interpret a federal or state criminal statute. Nor did it address the definition of an aggravating factor or the quantum of proof necessary to establish its existence. *Ring* did not require the prosecution to prove anything more than it had to prove previously. To the contrary, it required the jury to find the identical facts (an aggravating circumstance) that the court formerly found under the identical standard (beyond a reasonable doubt). Because *Ring* did not change what is to be found at sentencing, but only who finds it, the new rule announced in *Ring* is procedural, not substantive.

The Ninth Circuit's ruling conflicts with this Court's characterization of the rule announced in *Apprendi* as procedural. In *Apprendi*, this Court held that removing from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed violates the Sixth Amendment. 530 U.S. at 490. *Ring* is an application of *Apprendi* to the capital sentencing context, and there is no principled basis for finding that *Apprendi* represents a procedural change for purposes of a retroactivity analysis, while finding that *Ring* is a substantive change under that same analysis.

Furthermore, the Ninth Circuit's conclusion that *Ring* altered the substantive statutory law of the State of Arizona invades the province of the Arizona Supreme Court to interpret Arizona statutes. The Arizona Supreme

Court has expressly ruled that *Ring* did not alter substantive criminal law in Arizona, and the Ninth Circuit erred by failing to defer to that ruling.

The Ninth Circuit further erred by alternatively holding that the new procedural rule announced in *Ring* fits within a narrow exception to *Teague*'s retroactivity bar for cases that implicate the fairness and accuracy of criminal proceedings. The decision below does not rest on any evidence that judicial fact-finding of aggravating circumstances in a capital case is less accurate than jury fact-finding of those circumstances. In fact, this Court presumes that judges consider all relevant sentencing information before them and properly apply the law. This Court has also noted that in the context of capital sentencing, judges may act more consistently than jurors. *Proffitt*, 428 U.S. at 252 & n.10. A change from fact-finding by a fair and impartial judge to fact-finding by a fair and impartial jury does not implicate bedrock principles of procedure implicit in the concept of ordered liberty, nor does it necessarily affect, much less increase, the accuracy of the trial or sentencing process. Just as it failed to provide a principled basis for finding that *Apprendi* is procedural while *Ring* is substantive, the Ninth Circuit failed to articulate a meaningful rationale for treating *Ring*, but not *Apprendi*, as a watershed rule under *Teague*'s second exception.

Moreover, after this Court announced in *Duncan v. Louisiana*, 391 U.S. 145 (1968), that the Sixth Amendment jury-trial guarantee applies to the states through the Fourteenth Amendment, this Court determined in *DeStefano v. Woods*, 392 U.S. 631 (1968), that *Duncan* does not apply retroactively. If application of the Sixth Amendment itself is not retroactive, it would be anomalous to hold that

an incremental extension of the jury-trial guarantee is retroactive.

Furthermore, violations of "watershed" constitutional rules do not lend themselves to a harmless-error analysis because they render the proceedings unfair and inaccurate. In contrast, this Court has implied that *Ring* error is subject to a harmless error analysis. *Ring*, 536 U.S. at 609 n.7.

Finally, *Walton* placed the propriety of judicial determination of aggravating factors in capital cases squarely before this Court in 1990. No evidence has emerged since 1990 to suggest that having an impartial judge determine aggravating circumstances has created any unfairness or inaccuracy in the capital sentencing context. The State of Arizona and other states have justifiably relied on this Court's express holding in *Walton* in attempting to create capital sentencing procedures that comply with this Court's prior mandate to adequately channel the sentencer's discretion in capital cases and to increase the reliability of sentencing determinations.

To hold that the rule expressly upheld in *Walton* violates bedrock principles of procedure that implicate the fundamental fairness of the trial and sentencing proceedings would undermine principles of finality and comity. The financial and emotional costs to the parties and to victims in re-opening cases long after they have become final cannot be justified absent a showing that a new rule correcting unfairness and inaccuracy has altered our understanding of "bedrock" procedural elements essential to the conduct of a fair trial. Judicial fact-finding of aggravating circumstances was neither fundamentally unfair

nor unreliable, and this Court should reject the Ninth Circuit's holding to the contrary.

ARGUMENTS

I. THE NINTH CIRCUIT ERRED BY FINDING THAT *RING* ANNOUNCED A SUBSTANTIVE RULE.

A substantive change to a criminal statute applies retroactively to cases that have become final on direct appeal. *Bousley*, 523 U.S. at 620-21. In contrast, a new procedural rule does not apply retroactively unless it falls within one of two narrow exceptions: (1) the rule places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or (2) the rule requires the observance of those procedures that are "implicit in the concept of ordered liberty" and "without which[,] the likelihood of an accurate conviction is seriously diminished." *Teague*, 489 U.S. at 311, 313 (plurality opinion).

The Ninth Circuit decision below conflicts with this Court's analysis of the distinction between substantive and procedural rules and with overwhelming authority holding that *Apprendi*/*Ring* effected a procedural change.

A. The *Ring* rule does not fit within this Court's definition of a substantive change for retroactivity purposes.

A new rule is substantive, for purposes of retroactive application, if it interprets "the meaning of a criminal statute created by Congress" so that conduct that formerly

resulted in criminal liability may no longer be illegal. *Bousley*, 523 U.S. at 620.

> [D]ecisions of this Court holding that a substantive federal criminal statute does not reach certain conduct, *like decisions placing conduct "beyond the power of the criminal law-making authority to proscribe,"* [quoting *Teague*], necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal. For under our federal system it is only Congress, and not the courts, which can make conduct criminal.

Id. at 620-21 (emphasis added; citations and additional internal quotation marks omitted). The Ninth Circuit expressly recognized that "*Ring* did not decriminalize a class of conduct nor prohibit the imposition of capital punishment on a particular class of persons." (Cert. Pet. App. A-44) (internal quotation marks omitted). Nevertheless, the Ninth Circuit deemed the rule substantive. This paradox undermines the majority's analysis.

In *Bousley*, this Court held that a new rule announced in *Bailey v. United States*, 516 U.S. 137 (1995), was substantive because the new interpretation limited the conduct deemed unlawful under the federal statute at issue in the *Bailey* case. 523 U.S. at 620-21. In *Bailey*, this Court interpreted "use" in a federal firearms statute to mean "active employment of the firearm," rather than "mere possession." 516 U.S. at 144. Thus, *Bailey* held in this context that certain conduct (mere possession of a firearm) is not unlawful. "[I]t would be inconsistent with the doctrinal underpinnings of habeas review" to prohibit a prisoner who did not actively employ a firearm from seeking the benefit of the substantive interpretation of the

statute. *Bousley*, 523 U.S. at 621. Habeas review "is founded on the notion that one of the 'principal functions of habeas corpus [is] to assure that no man has been incarcerated under a procedure which creates an impermissibly large risk that the innocent will be convicted.'" *Id.* at 620 (internal quotation marks omitted).

Conversely, a new procedural rule does not interpret the scope of a statute. *Id.* A procedural rule changes the way that a case is adjudicated, not what the government must prove to establish a criminal offense. *See Collins v. Youngblood*, 497 U.S. 37, 45 (1990). New procedural rules "recognize[ ] a constitutional right that typically applies to all crimes irrespective of the underlying conduct, and to all defendants irrespective of their innocence or guilt." *Coleman v. United States*, 329 F.3d 77, 84 (2d Cir. 2003). Such a rule changes an aspect of criminal proceedings, but rarely affects the "accurate determination of innocence or guilt." *Teague*, 489 U.S. at 313 (plurality opinion). Consequently, this Court declines to apply a new procedural rule retroactively to cases on collateral review unless the rule "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe," or implements a procedure "implicit in the concept of ordered liberty," without which "the likelihood of an accurate conviction is seriously diminished." *Id.* at 311, 313 (plurality opinion) (internal quotation marks omitted).

Ring did not involve an interpretation of a federal statute. Nor did it involve an interpretation of a state statute. There was nothing unclear or equivocal about any term defined in Arizona's first-degree murder statute and no risk that the defendant in *Ring* was convicted based on conduct that no longer constituted a crime. The rule that

Ring announced applies to all first-degree murder defendants irrespective of their underlying conduct or their innocence or guilt. Thus, *Ring* established a new procedural rule that does not apply retroactively unless it fits within one of the two narrow exceptions to the *Teague* bar.

B. The new rule that *Ring* announced is the same procedural rule that *Apprendi* announced, but applied to capital cases.

The ruling below conflicts with this Court's characterization of *Apprendi* as a procedural rule. In *Apprendi*, this Court considered the application of a New Jersey hate-crime statute that resulted in a sentence beyond the statutory range for the charged offense. The defendant pled guilty to possession of a firearm for an unlawful purpose, a crime that New Jersey's substantive criminal statute designated as a second-degree offense punishable under New Jersey's felony sentencing statute by a five- to ten-year prison term. 530 U.S. at 468-70. The charging document did not reference a separate New Jersey statute aimed at hate crimes that increased the maximum possible sentence by ten years upon a finding by the sentencing court – by a preponderance of the evidence – that there was a racial motive underlying the crime. *Id.* at 468-69. The New Jersey trial court made such a finding and imposed a twelve-year sentence. *Id.* at 471.

This Court found that application of New Jersey's hate-crime statute resulted in the judge making the type of finding traditionally reserved for the jury. *Id.* at 491-92. This Court held that because a finding of racial bias increased the penalty for the crime beyond the prescribed statutory maximum for the charged offense, the defendant had a Sixth Amendment right to have a jury make that

finding. *Id.* at 490, 494 n.19. This Court stated, "[p]ut simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed were by definition 'elements' of a separate legal offense" subject to the Sixth Amendment's jury-trial guarantee. *Id.* at 483 n.10.

Notwithstanding its depiction of racial motivation as an element of a greater offense that must be found by a jury beyond a reasonable doubt, this Court expressly characterized its ruling in *Apprendi* as a procedural decision: "The substantive basis for New Jersey's enhancement is thus not at issue; the adequacy of New Jersey's *procedure* is." *Id.* at 475 (emphasis added). This Court explained that New Jersey's policy behind the hate-crime sentence enhancement "has no . . . bearing on this *procedural* question[,]" that is, whether the Sixth Amendment requires a jury to determine if the defendant committed the crime motivated by hate. *Id.* (emphasis added).

Likewise, in *United States v. Gaudin*, 515 U.S. 506, 521 (1995), this Court expressly found a new rule to be procedural under analogous circumstances. In holding that the "materiality" of an allegedly false statement is an essential element of the crime of making false statements to a federal agency, this Court concluded that the question of materiality must therefore be submitted to the jury and be proven beyond a reasonable doubt. This Court nevertheless characterized the rule it created as procedural because it "does not serve as a guide to lawful behavior." *Id.*

In *Ring*, this Court determined that the logic underlying *Apprendi* applied to the determination of aggravating

circumstances in a capital case and compelled the conclusion that *Walton* should be overruled:

> [W]e hold that *Walton* and *Apprendi* are irreconcilable; our Sixth Amendment jurisprudence cannot be home to both. Accordingly, we overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty. *See* 497 U.S. at 647-649. Because Arizona's enumerated aggravating factors operate as "the functional equivalent of an element of a greater offense," *Apprendi*, 530 U.S. at 494, n.19, the Sixth Amendment requires that they be found by a jury.

536 U.S. at 609 (Supreme Court Reporter citations omitted); *see also id.* at 589. Thus, *Ring* applies *Apprendi* to capital cases. If the *Apprendi* rule is procedural, then the *Ring* rule must also be procedural.

Every federal appellate court that has considered whether *Apprendi* created a substantive or a procedural rule has found it to be a procedural rule that is not entitled to retroactive application on collateral review. *See Sepulveda v. United States*, 330 F.3d 55, 62-63 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77, 83-88 (2d Cir. 2003); *United States v. Jenkins*, 333 F.3d 151, 154 (3d Cir. 2003); *United States v. Sanders*, 247 F.3d 139, 147-48 (4th Cir. 2001); *United States v. Brown*, 305 F.3d 304, 307-09 (5th Cir. 2002); *Curtis v. United States*, 294 F.3d 841, 842-44 (7th Cir. 2002); *Cannon v. Mullin*, 297 F.3d 989, 994 (10th Cir. 2002).

With the exception of the Ninth Circuit, federal appellate courts have consistently equated the *Apprendi* and *Ring* rules in resolving the substantive/procedural

question. *See Turner v. Crosby*, 339 F.3d 1247, 1284 (11th Cir. 2003); *In re Johnson*, 334 F.3d 403, 405 n.1 (5th Cir. 2003)(dicta); *Cannon*, 297 F.3d at 944 (10th Cir. 2002). State appellate courts have similarly concluded that *Ring* merely extended the *Apprendi* rule to capital cases. *Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003); *Wright v. State*, 857 So. 2d 861, 877-78 (Fla. 2003); *Leone v. State*, 797 N.E.2d 743, 750 (Ind. 2003); *State v. Whitfield*, 107 S.W.3d 253, 257 (Mo. 2003); *Colwell v. State*, 59 P.3d 463, 469 (Nev. 2002), *cert. denied sub nom.*, *Colwell v. Nevada*, 124 S. Ct. 462 (2003); *Murphy v. State*, 54 P.3d 556, 566 (Okla. Crim. App. 2002).

C. This Court's ex post facto analysis in *Dobbert v. Florida* supports the conclusion that the *Ring* rule is procedural.

This Court's ex post facto doctrine parallels its retroactivity doctrine in an important respect: retroactive application of procedural rules does not offend the Ex Post Facto Clause, but retroactive application of substantive laws does. *Dobbert v. Florida*, 432 U.S. 282, 292 n.6 (1977). In *Dobbert*, the defendant argued that his death sentence violated the Ex Post Facto Clause. Dobbert had killed his children in 1972. At that time, Florida mandated a death sentence for capital felony convictions unless the jury, in its discretion, recommended mercy to the judge. *Id.* at 287. Before Dobbert was tried, the Florida Legislature amended the state's capital sentencing procedure to require a jury to consider aggravating and mitigating circumstances before imposing an advisory sentence. *Id.* at 289 n.5. Dobbert was sentenced under the new statute; a jury recommended life imprisonment, but the trial judge

overrode that recommendation and imposed death. *Id.* at 287.

Dobbert unsuccessfully argued to this Court that sentencing him under the new statute violated the Ex Post Facto Clause. This Court noted that ex post facto violations occur only when a statute makes criminal a previously innocent act, aggravates a crime previously committed, provides for greater punishment than the law that existed when the crime was committed, or changes the quantum of proof needed to convict a defendant. *Id.* at 292. This Court rejected Dobbert's claim, finding that the Florida statute did not fit within those descriptions; that the statutory change between the two sentencing methods was "clearly procedural;" and that "[t]he new statute simply altered the methods employed in determining whether the death penalty was to be imposed; there was no change in the quantum of punishment attached to the crime." *Id.* at 293-94.

An argument for retroactive application of *Ring* is less compelling than the ex post facto argument rejected in *Dobbert*. Unlike the change at issue in *Dobbert*, the rule announced in *Ring* did not subject the defendant to a possible death sentence notwithstanding a jury recommendation of a life sentence. If the sentencing change at issue in *Dobbert* was procedural, the change announced in *Ring* can only be procedural. *See also Collins*, 497 U.S. at 51-52 (rejecting an ex post facto challenge to a new sentencing statute and finding that even though there is a "substantial" right under the Sixth Amendment to a jury trial, "it is not a right that has anything to do with the definition of crimes, defenses, or punishments").

D. The Arizona Supreme Court correctly and authoritatively concluded that *Ring* did not substantively change Arizona's first-degree murder statute or its aggravating circumstances.

Although *Ring* did not interpret the meaning of an Arizona statute, the Ninth Circuit nevertheless concluded that it announced a substantive rule. The Ninth Circuit reasoned that *Ring* redefined the substantive elements of the offense of capital murder and changed the structure of Arizona's substantive murder law, thereby creating the de facto offense of "capital murder" (for which certain aggravating factors must be proven) in addition to the offense of first-degree murder. (Cert. Pet. App. A-28 to -41.) The Ninth Circuit's reasoning does not withstand scrutiny, and its conclusion improperly disregards an authoritative Arizona Supreme Court decision to the contrary.

As an initial matter, the Ninth Circuit's reasoning would apply equally to *Apprendi*, which had the same effect on New Jersey's possession-of-a-firearm-for-an-unlawful-purpose statute that *Ring* had on Arizona's murder statute. Yet the Ninth Circuit, and virtually all other appellate courts, view the *Apprendi* rule as procedural.

More fundamentally, this Court's decision in *Ring* did *not* redefine the substantive elements of the crime of capital murder in Arizona, nor did it change the structure of Arizona's capital murder law. To the contrary, the Arizona Supreme Court held in *State v. Towery*:

> [*Ring*] changed neither the underlying conduct that the state must prove to establish that a defendant's crime warrants death nor the state's burden of proof; it affected neither the facts necessary to establish Arizona's aggravating factors nor the state's burden to establish the factors beyond a reasonable doubt. Instead, [*Ring*] altered *who* decides whether any aggravating circumstances exist, thereby altering the fact-finding procedures used in capital sentencing hearings.

(Cert. Pet. App. B-10.) It could not be otherwise, because a federal court decision addressing a federal question cannot change the substance of a state offense, apart from holding that, constitutionally, a state cannot prohibit certain conduct (as addressed in the first *Teague* exception).

Because the Arizona Supreme Court had already rejected the proposition that *Ring* altered the substance of Arizona law before the Ninth Circuit issued the decision below, the Ninth Circuit was not free to disagree with *Towery*. "[A] state's highest court is the final judicial arbiter of the meaning of state statutes," and its reasonable interpretation of such statutes is "deemed conclusive." *Gurley v. Rhoden*, 421 U.S. 200, 208 (1975). "Neither this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). Moreover, this Court stated in *Ring* that "the Arizona court's construction of the State's own law is authoritative[.]" 536 U.S. at 603 (citation omitted). This deference, which the Ninth Circuit refused to accord below, is "fundamental to our system of federalism." *Fankell*, 520 U.S. at 916.

The Ninth Circuit decision misinterpreted this Court's decisions in *Apprendi* and *Ring*. This Court did not add

elements to extant state law crimes. This Court scrutinized the way that aggravating circumstances operated and found them to be "the functional equivalent of an element" for purposes of the jury trial guarantee, *Ring*, 536 U.S. at 609 (citing *Apprendi*, 530 U.S. at 494 n.19), that must therefore "be found by a jury." *Id.* The decisions may have changed how we view the reach of the Sixth Amendment's jury-trial guarantee, but they did not change or modify Arizona's statutes. *Apprendi*, and *Ring* in turn, simply found the statutory schemes unconstitutional for failing to provide the necessary procedural safeguards. Thus, the Ninth Circuit erred by concluding that *Ring* created a new crime, and by refusing to defer to the Arizona Supreme Court's correct and authoritative holding to the contrary.

II. THE RULE ANNOUNCED IN *RING* NEITHER SERIOUSLY ENHANCES THE ACCURACY OF THE PROCEEDING NOR ALTERS OUR UNDERSTANDING OF BEDROCK PRINCIPLES OF CRIMINAL PROCEDURE.

The Ninth Circuit majority acknowledges that if *Ring* is a procedural rule, it can only apply retroactively if it satisfies *Teague*'s "watershed" exception, which has two requirements. First, infraction of the rule must "seriously diminish the likelihood" of an accurate proceeding. *Tyler v. Cain*, 533 U.S. 656, 665 (2001) (internal quotation marks omitted); *see also Desist v. United States*, 394 U.S. 244, 262 (1969) (Harlan, J., dissenting) (stressing the principle subsequently adopted in *Teague* that new rules should not be applied on habeas review unless they "significantly improve the pre-existing fact-finding procedures").

Second, the new rule must also "alter our understanding of the *bedrock procedural elements*" that are essential to the fundamental fairness of a proceeding. *Tyler*, 533 U.S. at 665 (internal quotation marks omitted); *see also Mackey v. United States*, 401 U.S. 667, 693-94 (1971) (Harlan, J., concurring in judgments in part and dissenting in part) (making suggestion subsequently adopted in *Teague* that a new rule be applied on collateral review if it alters bedrock procedural understandings).

This narrow exception to the general rule of nonretroactivity is reserved for only a "small core" of watershed procedural rules that are "implicit in the concept of ordered liberty" and implicate "the fundamental fairness and accuracy of the criminal proceeding." *Graham v. Collins*, 506 U.S. 461, 478 (1993) (internal quotation marks omitted); *Teague*, 489 U.S. at 311-12 (same). Circuit courts have reasoned that for a rule to be considered watershed it must correct structural error and not be susceptible to harmless error review. *E.g. Goode v. United States*, 305 F.3d 378, 385 (6th Cir. 2002) (citing cases). This Court has said that even a rule correcting structural error does not automatically qualify as a watershed rule. *Tyler*, 533 U.S. at 666-67. Thus, classifying an error as structural, or as violative of fundamental requirements of due process, "does not necessarily alter our understanding of these bedrock procedural elements." *Id.* at 666 n.7.

This Court has cited *Gideon v. Wainwright*, 372 U.S. 335 (1963), as the prototypical example of a sweeping rule change that falls within this narrow exception. *Saffle v. Parks*, 494 U.S. 484, 495 (1990); *see also O'Dell v. Netherland*, 521 U.S. 151, 170 (1997) (*Gideon* is the "paradigmatic example" of a watershed rule); *Teague*, 489 U.S. at 311-12 (plurality opinion) (noting that the rule announced

in *Gideon* recognized a right that is a "necessary condition precedent to any conviction for a serious crime"). *Gideon* dramatically changed the landscape of American criminal procedure by requiring states to provide counsel in all criminal trials involving serious offenses. Since deciding *Teague* in 1989, this Court has analyzed a multitude of new rules under its watershed exception and found *none* that fits within it. *See, e.g., Tyler*, 533 U.S. at 666 n.7 (citing cases). A year *after* deciding *Apprendi*, this Court noted that "it is unlikely that any of these watershed rules ha[s] yet to emerge." *Id.* (internal quotation marks omitted). The rule announced in *Ring* is not an emerging rule of such magnitude because it meets neither of the two requirements necessary for retroactive application under the *Teague* watershed exception.

A. Judicial determination of aggravating circumstances did not seriously diminish the accuracy of Summerlin's sentence.

The *Ring* rule does not qualify for retroactive application under *Teague*'s watershed exception because it does not significantly increase the accuracy of the sentencing determination. Neither judicial determination of aggravating circumstances nor judicial determination of the ultimate sentencing decision seriously diminishes the likelihood of an accurate sentencing result.

This Court presumes that judges are unbiased and honest. *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). This Court further presumes that judges consider all relevant sentencing information before them and properly apply the law. *See Walton*, 497 U.S. at 653. Additionally, this Court has observed in the context of capital sentencing that judges may act more consistently than jurors.

Proffitt, 428 U.S. at 252; *see also Pulley v. Harris*, 465 U.S. 37, 46 (1984) (noting that more consistent sentencing decisions may result by vesting the ultimate sentencing authority in the judge).

The Arizona sentencing statute under which Summerlin was sentenced imposed stringent requirements that ensured accuracy and consistency in the capital sentencing determination. The statute employed a two-step procedure that this Court has characterized as having an "eligibility phase" and a "selection phase." *See Jones (Louis) v. United States*, 527 U.S. 373, 381 (1999); *Buchanan v. Angelone*, 522 U.S. 269, 275 (1998). The eligibility phase establishes whether the defendant is eligible for the death penalty; in Arizona, a defendant became death eligible upon a finding that the State established at least one aggravating circumstance. A.R.S. § 13-703(E) (1978). In making that finding, the trial judge could only consider evidence admissible under the rules of evidence and had to make the finding beyond a reasonable doubt. *See* A.R.S. § 13-703(C) (1978); *State v. Jordan*, 614 P.2d 825, 828 (Ariz. 1980). In the selection phase, the judge determined whether to impose a death sentence by considering whether evidence of mitigation was sufficient to call for leniency. A.R.S. § 13-703(E) (1978).

This distinction between the eligibility phase and the selection phase is significant for purposes of analyzing the accuracy prong of *Teague*'s watershed exception because *Ring* addresses only the eligibility phase. *Ring*, 536 U.S. at 597 n.4. Answering a "tightly delineated" question (*id.* at 597 n.4), this Court issued a correspondingly narrow ruling in *Ring*: "[W]e overrule *Walton* to the extent that it allows a sentencing judge, sitting without a jury, to find *an aggravating circumstance* necessary for imposition of the

death penalty." *Id.* at 609 (emphasis added). *Ring* did not address jury sentencing, or overrule *Proffitt* or *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). *See also Ring*, 536 U.S. at 612 (Scalia, J., concurring) (noting that the Court's ruling only commands that jurors "find the existence of the *fact* that an aggravating factor existed"); *cf. Oken v. State*, 835 A.2d 1105, 1147 (Md. App. 2003) (noting that "*Ring* holds no implications for the selection phase of Maryland's sentencing process"). Thus, the only relevant question is whether having a judge, rather than a jury, determine aggravating circumstances seriously diminished the *accuracy* of that determination.

The instant case illustrates the accuracy of judicial determinations of aggravating circumstances. The fact of Summerlin's prior felony conviction involving the use or threat of violence against another person is beyond challenge; a jury had previously convicted Summerlin of aggravated assault. The State established the second aggravating circumstance (the murder was committed in an especially heinous, cruel or depraved manner) by presenting substantial evidence that Summerlin had raped and bludgeoned the victim. (Tr. 6/7/82, at 156, 161-63; Tr. 7/8/82, at 6.) The Arizona Supreme Court found the same two aggravating circumstances in its independent review of the capital sentence. (App. 69-70.) There was nothing unreliable or inaccurate about the determination that the State established not only one, but two aggravating circumstances that rendered Summerlin death-eligible.

Even assuming, arguendo, that *Ring* implicates the selection phase of the sentencing decision, Summerlin cannot establish that judicial sentencing seriously diminished the accuracy of his sentence. Accuracy is not readily measurable in the selection phase because "[t]he decision

whether to impose the death penalty represents a moral judgment about the defendant's culpability, not a factual finding." *Parks*, 494 U.S. at 506 (Brennan, J., dissenting). "Any sentencing decision calls for the exercise of judgment." *Barclay v. Florida*, 463 U.S. 939, 950 (1983) (plurality opinion); *see also California v. Ramos*, 463 U.S. 992, 1008 (1983) (once the jury finds the defendant eligible for the death penalty, it is "free to consider a myriad of factors to determine whether death is the appropriate punishment"). Accordingly, reviewing courts cannot objectively assess the *accuracy* of the sentencer's moral judgment.

The facts of *Teague* are instructive in assessing the significance of jury involvement in sentencing as it relates to the "accuracy" of the sentence. In *Taylor v. Louisiana*, 419 U.S. 522, 530-31 (1975), this Court held that the Sixth Amendment requires trial courts to draw the jury venire from a fair cross section of the community, and struck down a procedure that operated to exclude women from the venire panel. In *Teague*, this Court addressed whether the Sixth Amendment's fair cross section requirement extends to selection of the petit jury. 489 U.S. at 292. Because Teague's claim arose in a collateral proceeding, this Court held that he could not benefit from such a new rule unless the rule made certain conduct noncriminal or constituted a watershed change. *Id.* at 299-316. In deciding that the new rule was not a watershed change, this Court first focused on the purpose of the jury as a guard "against arbitrary abuses of power" that "interpos[ed] the commonsense judgment of the community between the State and the defendant." *Id.* at 314. The Court noted that: "[T]he fair cross section requirement '[does] not rest on the premise that every criminal trial, or any particular trial, [is] necessarily unfair because it [is] not conducted in

accordance with what we determined to be the requirements of the Sixth Amendment.'" *Id.* at 314-15 (quoting *Daniel v. Louisiana*, 420 U.S. 31, 32 (1975)). Thus, this Court concluded in *Teague* that failure to fulfill this Sixth Amendment requirement "does not undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction." 489 U.S. at 315.

The Ninth Circuit's conclusion that "the *Ring* rule enhances the accuracy of the determination of capital murder in Arizona" (Cert. Pet. App. A-45) is unsupportable. Having a fair and impartial judge, rather than a fair and impartial jury, determine whether the state has established at least one aggravating circumstance beyond a reasonable doubt does not seriously diminish the accuracy of that determination. Nor does it diminish the accuracy of any other aspect of the sentencing process. Thus, *Ring* does not qualify for retroactive application under *Teague*'s watershed exception.

B. The *Ring* decision did not alter bedrock principles of procedure.

Under *Teague*'s watershed exception, a new procedural rule must do more than improve the accuracy of the proceeding. *Sawyer v. Smith*, 497 U.S. 227, 242 (1990). It must also change our understanding of bedrock procedural elements *essential* to the fairness of a proceeding. *Id*; *Teague*, 489 U.S. at 311 (explaining that the exception is reserved for the rare instance in which changes in society and judicial perceptions of what can be demanded of the adjudicatory process alter this Court's understanding "of

the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction").

In *DeStefano v. Woods*, 392 U.S. 631, 633 (1968), this Court held that *Duncan v. Louisiana*, 391 U.S. 145 (1968), which applied the Sixth Amendment's jury-trial guarantee to the states through the Fourteenth Amendment, "should receive only prospective application." Although this Court decided *DeStefano* before *Teague, DeStefano* confirms – as does *Duncan* – that the core concern of the jury-trial guarantee is not fundamental fairness. "The values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." *DeStefano*, 392 U.S. at 634. If application of the Sixth Amendment *itself* is not retroactive, application of a new Sixth Amendment rule that requires a jury to decide the existence of facts required to impose a capital sentence is similarly nonretroactive. A different result would be anomalous.

In *O'Callahan v. Parker*, 395 U.S. 258 (1969), *overruled, Solorio v. United States*, 483 U.S. 435 (1987), this Court held that when the Government charges a person in the military with a crime unconnected to military service, two important constitutional guarantees apply: (1) indictment by a grand jury and (2) trial by jury in a civilian court. *O'Callahan*, 395 U.S. at 273. In *Gosa v. Mayden*, 413 U.S. 665, 685 (1972), however, this Court held that these important constitutional guarantees do not apply retroactively. In reaching this conclusion, the Court relied on *DeStefano*'s implicit conclusion that bench trials are not "so infected by unfairness as to be null and void." 413 U.S. at 676 (plurality opinion).

Similarly, in *Daniel*, this Court held that the fair representation requirement for petit jury venires did not apply retroactively. 420 U.S. at 32. *DeStefano* "clearly controlled" that decision: "[O]ur decision did not rest on the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment." *Id.* The Ninth Circuit did not address *DeStefano*, *Gosa*, or *Daniel* in the decision below. Its ruling does not square with those cases.

Moreover, in *Ring*, this Court explained that "[t]he Sixth Amendment jury trial right . . . does not turn on the relative rationality, fairness, or efficiency of potential factfinders." 536 U.S. at 607. This Court has similarly observed that *Apprendi* error does not seriously affect the fairness, integrity, or public reputation of judicial proceedings. *United States v. Cotton*, 535 U.S. 625, 634 (2002) (holding that *Apprendi* error did not rise to the level of "plain error"); *see also Johnson v. United States*, 520 U.S. 461, 470 (1997) (holding that failure to submit an element of an offense to the jury did not "'seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings'" where the Government presented overwhelming evidence (quoting *United States v. Olano*, 507 U.S. 725, 736 (1993))). Accordingly, *Ring* does not qualify for retroactive application under the narrow *Teague* exception for bedrock procedural elements essential to the fundamental fairness of a proceeding.

This Court's analysis in *Neder v. United States*, 527 U.S. 1 (1999), further supports the conclusion that *Ring* did not announce a watershed rule. In *Neder*, this Court held that error in failing to instruct the jurors on an element of the offense can be harmless and did not result

in structural error in that case because it did not necessarily render the trial fundamentally unfair or unreliable. 527 U.S. at 9. In *Ring*, this Court left to the Arizona Supreme Court to decide, in the first instance, if the judge's finding of the pecuniary gain aggravating circumstance was harmless error. 536 U.S. at 609 n.7 (citing *Neder*); *see also Mitchell v. Esparza*, 540 U.S. ___, 124 S. Ct. 7, 12 (2003) (per curiam) (holding that a state court's application of harmless error review to a *Ring* error was not objectively unreasonable).

Violations of "watershed" constitutional rules (such as the right to representation by counsel in all phases of criminal trials identified in *Gideon*) do not lend themselves to a harmless-error analysis. *See Holloway v. Arkansas*, 435 U.S. 475, 489 (1978) ("[W]hen a defendant is deprived of the presence and assistance of his attorney, either throughout the prosecution or during a critical stage in, at least, the prosecution of a capital offense, reversal is automatic.") (citing *Gideon*). Because error in having a fair and impartial judge, rather than a jury, determine aggravating circumstances does not implicate fairness concerns and is subject to a harmless-error analysis, a finding that the new rule announced in *Ring* is a watershed rule would be inconsistent with *Ring* and *Neder*.

Every federal circuit court, including the Ninth Circuit, that has considered *Apprendi* retroactivity has concluded that *Apprendi* did not announce a watershed rule. *See Sepulveda v. United States*, 330 F.3d 55, 59-63 (1st Cir. 2003); *Coleman v. United States*, 329 F.3d 77, 88-90 (2d Cir. 2003); *United States v. Swinton*, 333 F.3d 481, 489-91 (3d Cir. 2003); *United States v. Sanders*, 247 F.3d 139, 148-51 (4th Cir. 2001); *Brown*, 305 F.3d at 309-10;

Regalado v. United States, 334 F.3d 520, 526-27 (6th Cir. 2003); *Curtis v. United States*, 294 F.3d 841, 843-44 (7th Cir. 2002); *United States v. Moss*, 252 F.3d 993, 998-1001 (8th Cir. 2001); *United States v. Sanchez-Cervantes*, 282 F.3d 664, 669-70 (9th Cir. 2002); *United States v. Mora*, 293 F.3d 1213, 1218-19 (10th Cir. 2002); *McCoy v. United States*, 266 F.3d 1245, 1255-57 & n.16 (11th Cir. 2001).

State appellate courts have also concluded that *Apprendi* did not announce a watershed rule. *People v. Bradbury*, 68 P.3d 494, 496-97 (Colo. App. 2002); *Figarola v. State*, 841 So. 2d 576, 577 (Fla. App. 2003); *People v. Gholston*, 772 N.E.2d 880, 886-88 (Ill. App. 2002); *Whisler v. State*, 36 P.3d 290, 300 (Kan. 2001); *Meemken v. State*, 662 N.W.2d 146, 149-50 (Minn. App. 2003); *Teague v. Palmateer*, 57 P.3d 176, 183-87 (Ore. App. 2002).

Similarly, appellate courts, other than the Ninth Circuit, that have considered retroactive application of *Ring* in light of *Teague* have also concluded that *Ring* is not a watershed rule. *Turner v. Crosby*, 339 F.3d 1247, 1286 (11th Cir. 2003); *Towery*, (Cert. Pet. App. B-11 to -14), *cert. dismissed*, 124 S. Ct. 44 (2003); *Head v. Hill*, 587 S.E.2d 613, 619 (Ga. 2003); *State v. Lotter*, 664 N.W.2d 892, 905-08 (Neb. 2003); *Colwell*, 59 P.3d at 473; *cf. Szabo v. Walls*, 313 F.3d 392, 398-99 (7th Cir. 2002) (dicta) (because of 28 U.S.C. § 2254(d)(1) and *Teague*, *Ring* does not govern on collateral attack). This Court should similarly conclude that *Ring* is not a watershed rule.

C. The decision below imposes significant societal costs and strains the judicial system without correcting any unfairness or inaccuracy.

"[T]he writ of habeas corpus has historically been regarded as an extraordinary remedy [that is] 'a bulwark against convictions that violate "fundamental fairness"'" and is reserved for persons whom society has "grievously wronged." *Brecht v. Abrahamson*, 507 U.S. 619, 633-34 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 126 (1982), in turn quoting *Wainwright v. Sykes*, 433 U.S. 72, 97 (1977) (Stevens, J., concurring)).

> Retrying defendants whose convictions are set aside also imposes significant "social costs," including the expenditure of additional time and resources for all the parties involved, the "erosion of memory" and "dispersion of witnesses" that accompany the passage of time and make obtaining convictions on retrial more difficult, and the frustration of "society's interest in the prompt administration of justice."

Brecht, 507 U.S. at 637 (quoting *United States v. Mechanik*, 475 U.S. 66, 72 (1986) (internal quotation marks omitted in original)).

The decision below undermines the goal of obtaining a reliable result through a fundamentally fair process. The results of a proceeding long after the main event – the trial – will almost always be far *less* reliable. Hence, federal habeas courts weigh the state's strong interest in finality against the collateral adjudication of constitutional claims. *See Kuhlmann v. Wilson*, 477 U.S. 436, 447-48 (1986) (citing cases).

Furthermore, left uncorrected, the decision below will disrupt litigation in many other federal and state cases. It will directly affect the decisions applying *Apprendi* and *Ring*, as well as precipitate litigation in other lines of cases. For example, lower courts treat the rule in *Gaudin*, 515 U.S. at 522-23, which requires the jury to determine the "materiality" of an act of fraud under 18 U.S.C. § 1001, as a procedural rule for retroactivity purposes. *See, e.g.*, *United States v. Mandanici*, 205 F.3d 519, 527-31 (2d Cir. 2000); *United States v. Shunk*, 113 F.3d 31, 32-37 (5th Cir. 1997). This Court has held that an error based on *Gaudin* may be reviewed for harmless error and does not rise to the level of plain error. *Neder*, 527 U.S. at 8-11 (harmless error); *Johnson*, 520 U.S. at 469-70 (plain error). *Gaudin* is analytically indistinguishable from *Ring*. A decision that *Ring* applies retroactively would throw this Court's carefully crafted *Teague* analysis into a state of confusion and foster additional litigation far beyond Arizona's death row population and even beyond the many existing *Apprendi*-based claims.

Similarly, if left uncorrected, the decision below would inject uncertainty into adjudication of double jeopardy claims, because if *Ring* created an unproven, uncharged element of a greater offense, litigants will argue that the state or federal government failed to carry its burden of proof as to each element of the greater offense and cannot retry the case. This Court's decisions in *Castillo v. United States*, 530 U.S. 120 (2000) (holding that under 18 U.S.C. § 924(c)(1) what courts had previously treated as sentencing factors must be treated as elements of a separate aggravated crime), and *Jones (Nathaniel) v. United States*, 526 U.S. 227 (1999) (holding that 18 U.S.C. § 2119 created three separate distinct offenses instead of sentencing

factors for one offense), would become fodder for countless collateral attacks on this ground.

The *Teague* doctrine achieves the appropriate balance of interests in questions of retroactive application, and compels the conclusion that *Ring* does not apply retroactively. Federal courts should not penalize states for relying on "the constitutional standards that prevailed at the time the original proceedings took place." *Teague*, 489 U.S. at 306 (plurality opinion). "State courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover during a [habeas] proceeding, new constitutional commands." *Butler v. McKellar*, 494 U.S. 407, 414 (1990) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 n.33 (1982)).

Arizona has faithfully complied with this Court's changing constitutional requirements relating to capital punishment, amending its statutes in response to this Court's evolving capital jurisprudence. Following this Court's decision in *Furman v. Georgia*, 408 U.S. 238 (1972), finding standardless sentencing discretion in capital cases unconstitutional, the Arizona legislature amended its capital sentencing procedure to include statutory aggravating and mitigating circumstances and to provide for judge-sentencing. 1973 Ariz. Sess. Laws. ch. 138, § 2 (1st Reg. Sess.). Following the decisions in *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Bell v. Ohio*, 438 U.S. 637 (1978), the Arizona legislature amended its sentencing procedure to allow the sentencer to consider any relevant mitigation. 1979 Ariz. Sess. Laws. ch. 144, § 1 (1st Reg. Sess.). Believing that *Proffitt* permitted judicial determination of the aggravating circumstances as well as judicial sentencing, the Arizona Supreme Court rejected capital defendants' Sixth Amendment challenges to Arizona's

sentencing scheme in this and other cases. In *Walton*, this Court agreed. Arizona should not be punished for relying on "the constitutional standards that prevailed at the time the original proceedings took place." *Teague*, 489 U.S. at 306 (plurality opinion) (quoting Harlan, J., dissenting in *Desist*, 394 U.S. at 262-63)). The state should not be forced to marshal its evidence once again so that a new jury can substitute its moral judgment for that of the judge who heard the evidence when it was fresh more than twenty years ago.

Reopening cases such as this, many years after they become final, inflicts financial and emotional costs on the parties, the surviving victims, and the courts. The costs are unjustified when the error being corrected did not result in an unfair or inaccurate proceeding that casts real doubt on the result or changes the way our courts look at bedrock procedural elements of a fair trial. The judicial fact-finding of aggravating circumstances in this case was neither fundamentally unfair nor unreliable, and this Court should reject the Ninth Circuit's conclusion to the contrary.

CONCLUSION

Petitioner respectfully asks this Court to (1) hold that the rule announced in *Ring* does not apply retroactively to cases that are final on direct appeal because the rule is procedural and does not fall within *Teague*'s second exception for watershed rules, and (2) reverse the Ninth Circuit's decision insofar as it vacates the sentence of death.

Respectfully submitted,

TERRY GODDARD
Attorney General

MARY R. O'GRADY
Solicitor General

KENT E. CATTANI
Chief Counsel
Capital Litigation Section

JOHN PRESSLEY TODD
Assistant Attorney General
(*Counsel of Record*)

ROBERT L. ELLMAN
Assistant Attorney General

Attorneys for Petitioner